



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 25, 2004

Mr. Charles R. Kimbrough
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701

OR2004-1368

Dear Mr. Kimbrough:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 196748.

The Village of Bee Cave (the "village") received a request for information regarding the Shops at the Galleria project. You state that the village made some responsive information available to the requestor. However, you claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.107, 552.110, and 552.117 of the Government Code. Additionally, you have notified three interested third parties of the village's receipt of the request for information pursuant to section 552.305 of the Government Code.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). The village has submitted the information at

¹The interested third parties you notified are: Terry Boothe; Martin & Salinas Public Affairs; and CCNG Development.

issue to this office.² We have considered your arguments and reviewed the submitted information.

Initially, we note that chapter 552 of the Government Code does not require a governmental body to release information that did not exist when it received a request for information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 452 at 3 (1986), 362 at 2 (1983). In this instance, the documents in Items 71-73, 82, 84-85, 101, and 104-05 were created after the date of the village's receipt of this request. Thus, these documents are not responsive to the request for information, and we need not address the applicability of the Act to them.

We next note that this request seeks information that is subject to a previous ruling from this office. In Open Records Letter No. 2004-1134 (2004), we considered a request that the village received for information regarding the Shops at the Galleria. The documents the village has submitted in response to the present request were among those submitted in conjunction with the previous ruling request. You make the same arguments and representations with respect to this information as you did in the prior ruling request. We thus understand you to represent that the facts and circumstances surrounding that ruling have not changed. Therefore, the village may rely on Open Records Letter No. 2004-1134 as a previous determination for the information at issue here that was the subject of the prior request. *See* Open Records Decision No. 673 at 6-7 (2001) (previous determination exists where requested information is precisely same information addressed in prior attorney general ruling, ruling is addressed to same governmental body, ruling concludes that information is or is not excepted from disclosure, and law, facts, and circumstances on which ruling was based have not changed). To the extent that the information requested in this instance was not the subject of the ruling in Open Records Letter No. 2004-1134 (2004), we will address your arguments.

You assert section 552.103 of the Government Code excepts the remaining submitted information from public disclosure. This section provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

²You state that for certain documents "being too large and voluminous to photocopy efficiently," you have submitted a representative sample. We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us, and have provided documentation showing, that, prior to its receipt of the present request, the village was sued by the Save Our Springs Alliance ("SOS"). You inform us that, at the time the village received this request, no final judgment had been entered in that litigation. We therefore find that you have met the first prong of the section 552.103 test.

We note, however, that the pending litigation concerns a development project referred to as the Hill Country Galleria while the information at issue in this request pertains to a project known as the Shops at the Galleria. You assert that SOS and the requestor "clearly believe that the *Shops at the Galleria* project and the *Spanish Oaks* property are related to the factual and legal issues made the subject of the pending SOS suit involving the *Hill Country Galleria*." In support of this assertion, you have provided an excerpt from a deposition taken on August 27, 2003, in the pending lawsuit in which an attorney representing SOS asks several questions regarding the "Spanish Oaks property across the street from the Galleria" and agreements made concerning that property. Oral Deposition of Caroline Murphy, Taken August 27, 2003, pp. 115-19. When asked why information concerning other property was relevant to the pending lawsuit, the attorney for SOS responded, "Well it seems to be identical. We might want to amend our pleadings." Having considered your arguments and reviewed the petition and submitted documents, we find that you have established that the information at issue is related to the pending litigation for purposes of section 552.103(a). Thus, the village may withhold this information pursuant to section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that

information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the documents in Items 71-73, 82, 84-85, 101, and 104-05 were created after the date of the village's receipt of this request and are not responsive to the request for information. The village may rely on Open Records Letter No. 2004-1134 as a previous determination for the information at issue here that was the subject of the prior request. The remaining submitted information may be withheld under section 552.103.³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

³As our ruling is dispositive, we do not address your remaining claims.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 196748
Enc. Submitted documents

c: Ms. Donna Tiemann
Save Barton Creek Association
3203 Cupid Drive
Austin, Texas 78735-6904
(w/o enclosures)

Mr. Terry Boothe
12535 Hwy. 71 West
Bee Cave, Texas 78738
(w/o enclosures)

c: Mr. Chris Milam
Martin & Salinas Public Affairs
3345 Bee Caves Road, Suite 212
Austin, Texas 78746
(w/o enclosures)

Mr. Matt Whelan
Mr. Daniel Porter
CCNG Development
13453 Hwy. 71 West
Bee Cave, Texas 78738
(w/o enclosures)